TITLE 93

PROCEDURAL RULE

WORKERS' COMPENSATION OFFICE OF JUDGES

SERIES 1

LITIGATION OF PROTESTS

TITLE 93 – SERIES 1
WORKERS' COMPENSATION OFFICE OF JUDGES
Litigation of Protests

§93-1-1 GENERAL

1.1 Scope - These procedural rules shall govern the initiation and conduct of litigation in contested Workers' Compensation claims before the Workers' Compensation Office of Judges.

1.2 Authority - West Virginia Code §23-5-8(e).

1.3 Filing Date: July 29, 2005.

1.4 Effective Date: September 1, 2005.

1.5 These rules supersede those promulgated with an effective date of January 1, 2004.

§93-1-2 INDEX

§93-1-3 DEFINITIONS

3.1 Claims Administrator

Where used within this rule, "claims administrator" shall mean the entity with legal authority to administer workers' compensation claims, make awards, and take any other administrative actions as were previously exclusively delegated to the Workers' Compensation Commission in Chapter Twenty-three of the W.Va. Code. In some places in the code, the term "issuing entity" is used. For purposes of this rule, "claims administrator" and "issuing entity" mean the same thing.

"Claims administrator" shall refer to the Workers' Compensation Commission, or its successor, the W.Va. Insurance Commission, any self-administering employer who has been granted self-insured status, any authorized Third Party Administrator, or any private insurance carrier authorized to issue workers' compensation coverage in West Virginia, or any duly authorized agents of any of the preceding.

3.2 Party

"Party" refers to either the injured worker (claimant) or the employer. W.Va. Code §23-5-1(e) provides that the Workers' Compensation Commission, until termination, is also a party to all appeals under the chapter. The successor to the Workers' Compensation Commission, and any other private carriers, are not a party to the litigation.

W.Va. Code §23-2C-16(c) allows the Insurance Commission to object to certain decisions of claim administrators. The Insurance Commission is also responsible for other Funds created in Articles 2 and 2C. Therefore, the Insurance Commission is a party to the litigation in all protests involving the following funds:

A. Old Fund claims [23-2C-16(c)];

B. Self-insured security risk pool and Self-insured guaranty risk pool [23-2-9(i)];

C. Uninsured employers fund [23-2C-8];

D. Private carrier guaranty fund [23-2C-9];

E. Assigned risk fund (adverse risk pool) [23-2C-10]

3.3 Expedited Hearing

"Expedited hearing", as used in W.Va. Code §23-4-1c(a)(3), refers to the final resolution of the issue. The term "hearing" is used in the sense of an opportunity for a party to offer evidence or argument and have his or her cause considered (heard), rather than used in the sense of a formalized appearance before a judge.

3.4 Most Compelling of Good Cause

"Most compelling of good cause", signifies some extraordinary circumstance and contemplates a more compelling reason than the ordinary "good cause" required elsewhere in the Rule. A reason that might be sufficient for "good cause" may well not be sufficient for "most compelling of good cause".

3.5 Closing Argument and Case Summation

"Closing argument" or "case summation" is a written discussion of the facts and controlling law of the case. Such written summary may be submitted at any time up to ten days after the expiration of the time frame. Such summary does not constitute argument in lieu of evidence as defined in subsection 3.6, below, for purposes of section ten [93-1-10 et seq.)]

3.6 Argument in Lieu of Evidence

"Argument in lieu of evidence" refers to a written statement explaining why the claims administrator's ruling is incorrect on its face. Such statement may be submitted instead of submitting new evidence when the party believes that additional evidence is not necessary. Such statement avoids having the claims

administrator's ruling automatically affirmed for failure to prosecute under section ten [93-1-10 et seq.]. Such statement must be filed during the protesting party's time frame.

3.7 Record

The "record" upon which a protest is decided shall include evidence timely submitted by a party to the Office of Judges, evidence taken at hearings conducted by the Office of Judges, and relevant documents from the claim file.

In as much as the Office of Judges does not have access to all documents in all claim files, this Rule identifies types of documents that are generally relevant to issues and requires delivery of those documents by the employer to the Office of Judges.

For protests in litigation before the effective date of this amendment to the Rule, any documents already designated under the former version of this Rule will remain a part of the record.

§93-1-4 PURPOSE

The purpose of the litigation process before the Office of Judges is to receive and consider, as expeditiously and as fairly as possible, evidence and information relevant to the determination of the rights of the parties and to provide a review of claims management rulings made by the claims administrator with regard to the grant or denial of any award, or the entry of any order, or the grant or denial of any modification or change with respect to former findings, orders or awards made pursuant to the West Virginia Workers' Compensation Law, W.Va. Code §23-1-1 et seq., as amended.

The Office of Judges recognizes that, with the passage of the 2005 amendments to workers' compensation law, there have occurred changes in the administrative structure of workers' compensation claims management. With the termination of the Workers' Compensation Commission, claims management rulings will be made by a representative of the employer or by a self-insured employer rather than by a government agency. All claims administrators, regardless of any customer and insurer relationship, are required to follow all mandates and requirements of Chapters Twenty-three and Thirty-three of the W.Va. Code. However, the previous versions of this Rule were created in view of the old structure for administration of claims. Among the 2005 amendments was a requirement that the Office of Judges review this Rule. The current version of this Rule has been promulgated with due consideration given to the fundamental changes to the process of claims administration.

§93-1-5 REPRESENTATION of PARTIES

5.1 Individuals

Any claimant or employer, who is a natural person, may appear at and represent himself or herself in any matter before the Office of Judges. At a hearing, the Administrative Law Judge or Hearing Examiner shall explain to any party appearing without counsel the right to employ counsel, and shall inquire as to the desire of such persons to obtain counsel. In appropriate cases the hearing may be continued to permit a party to obtain counsel; however, absent a showing of good cause, a hearing shall be continued only one time for a party to obtain counsel.

5.2 Corporations; Workers' Compensation Commission

A corporate employer**,** and the Workers' Compensation Commission**,** may be represented only by an attorney duly licensed or authorized to practice law in the State of West Virginia. However, an employee of a corporation may testify at a hearing without the presence of counsel.

5.3 Counsel

Only an attorney duly licensed or authorized to practice law in the State of West Virginia may represent a claimant or employer in a matter before the Office of Judges.

5.4 Lay representative

A party may not be represented in a matter before the Office of Judges by a spokesperson, lay representative or anyone else not admitted to practice law in the State of West Virginia.

§93-1-6 LITIGATION PROCESS

6.1 Protests

Any objection, referred to as "protest", to a ruling of the claims administrator shall be filed with the Office of Judges in writing and a copy served on the claims administrator and all parties. The protest shall include a copy of the ruling to which the protest has been made.

6.2 Time Period for Filing a Protest

Any protest under this section shall be filed with the Office of Judges within thirty (30) days after receipt of the notice set forth in W.Va. Code §23-5-1.

As provided in W.Va. Code §23-5-6, the period within which a protest must be filed may be expanded to sixty (60) days for good cause or excusable neglect.

6.3 Acknowledgment of Filing a Protest

The Office of Judges shall determine if a protest is timely filed, acknowledge receipt of timely filed protests, and may issue Time Frame Orders in regard to the litigation of such protests. A Time Frame Order shall be interlocutory in nature and not subject to appeal.

6.4 Time Frame Orders

A Time Frame Order shall set forth the sequence in which evidence shall be presented by the parties and the time periods within which such evidence shall be presented. A Time Frame Order may include such other matters as deemed appropriate by the Chief Administrative Law Judge or his/her designee. Except for those expedited issues identified in section nine [93-1-9 et seq.], a Time Frame Order may be modified, amended or extended at the request of a party, but only for good cause shown. The Office of Judges may modify or amend a Time Frame Order without such a request for appropriate administrative purposes. A request for modification, amendment, or extension, of the Time Frame, must be in writing and must be made no later than ten (10) days prior to the expiration of the existing Time Frame Order. Any extension request filed later than ten (10) days prior to the expiration of the requesting party's existing Time Frame Order shall be denied unless good cause is found for the untimeliness of the request. Any request, timely or otherwise, for an extension of time must set forth the reason an extension is necessary and shall include a statement of the efforts the party has made to comply with the Time Frame Order.

6.5 Case Summations and Arguments in Lieu of Evidence

Except for purposes of section ten [93-1-10 et seq.] ("Failure to Prosecute Protest") of this Rule, parties may file argument, explanation of case, or statement of authority in a case summation (sometimes referred to as a "closing argument"). Any such case summation or closing argument must be filed within ten (10) days after the expiration of the final Time Frame. Any argument, explanation of case, or statement of authority filed later than ten (10) days after the expiration of the final Time Frame may be considered at the discretion of the ALJ.

As noted in section ten [93-1-10 et seq.], "Failure to Prosecute Protest", argument submitted in lieu of evidence must be filed within the protesting party's time frame.

6.6 Order of Presentation of Evidence

Evidence in regard to a protest shall be presented either concurrently or consecutively as set forth by Time Frame Order. The protesting party shall have the burden of going forth with evidence first in those protests with consecutive time frames. In the event that the claimant and at least one employer have protested, the parties shall proceed concurrently.

6.7 Manner and Receipt of Notice

Any notice required by these rules shall be deemed adequate if served upon counsel of the other parties (or the party if not represented by counsel) as may be permitted as in Rule 5 of the West Virginia Rules of Civil Procedure. Filing by facsimile is permitted together with other electronic means as may be approved by the Chief Administrative Law Judge. Receipt of notice shall be presumed seven (7) calendar days after the date of notice. If service at the last known address is returned by the United States Postal Service as undeliverable, a party shall notify the Office of Judges and thereafter need not continue serving notices at that address.

It is the duty of each party to notify the office of judges and all other parties of any change of address.

6.8 Further Action

The Chief Administrative Law Judge or his/her authorized representative shall review the transcripts of the hearings, testimony, the evidence, and arguments, and take such action with regard to the issues as shall be appropriate. The Chief Administrative Law Judge or his/her authorized representative may order further action in a protest when it appears that a legal issue has not been sufficiently addressed, or when the record appears to have been burdened with excessive submissions or designations. Any further action so ordered shall be limited to those matters specifically referenced in the order. Such further action may include additional hearings, the requirement of the filing of briefs or summations, the requirement of an explanation of the relevance and materiality of any evidence, or such other action as may promote the ends of justice and judicial economy.

§93-1-7 EVIDENCE; EXCHANGE and FILING

7.1 Introduction

Evidence submitted to the Office of Judges is generally of three types: documentary evidence (i.e., reports, affidavits, treatment records, etc.); testimony of witnesses (either obtained during Office of Judges scheduled administrative hearings or during depositions scheduled by the parties); physical evidence (i.e.,

photographs, video recordings, etc.). This section of the Rule relates to the obtaining, presenting, exchanging, and identifying for the Office of Judges, of all evidence regardless of types.

7.2 Rules

A. Rules of Evidence

The Office of Judges shall not be bound by the usual common law or statutory rules of evidence, or by formal rules of procedure, except as provided by these rules. An Administrative Law Judge or Hearing Examiner shall receive the relevant testimony and other timely evidence of the parties and witnesses, as may further be limited by subsections 8.1 and 8.5 [93-1-8.1 & 93-1-8.5] of this rule, and subject to objection by any party. Provided, that the parties shall not burden the record with cumulative, redundant, or repeated filing of similar evidence. All evidence filed must be relevant, material, credible and reliable.

Evidence submitted or filed after the expiration of a time frame, and evidence which was not copied to all other parties, shall be rejected by the Office of Judges and shall not be part of the record upon which the decision is made. Untimely evidence may be accepted upon a showing of good cause.

B. Discovery

1. Generally

Amendments to the W.Va. Code in 2003 and 2005 have fundamentally changed the administration of claims. Responsibility has now been transferred to employers, and their administrators, as to what rulings are made and when rulings are made. With this additional control over the process, employers and claims administrators can, and should, begin the discovery process early instead of waiting until after formal litigation has commenced. The early start of discovery is particularly important when the issue is required by law to be expedited.

The entitlement of all parties to due process of law requires the Office of Judges to allow for a reasonable opportunity to discover evidence relevant to the protest. However, for those issues that the Legislature has mandated the Office of Judges to provide an expedited process, in W.Va. Code §23-4-1c(a)(3) and elsewhere, the time available for discovery must be limited. The expedited process cannot be circumvented merely by a request for discovery opportunity. All discovery and presentation of evidence must be completed during the existing time frame. An extension may only be granted as provided in the rules controlling the extension of Time Frames.

2. Interrogatories

(a) Written interrogatories may be utilized in the discovery process but only for those protests where the time frame exceeds sixty (60) days. Interrogatories and answers shall be filed with the office of Judges when answered.

(b) Each party shall be limited to a maximum of thirty (30) written interrogatories, with each part or subpart of a numbered interrogatory being construed as a separate interrogatory.

(c) Each interrogatory shall consist of a single question, and shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The party upon whom the interrogatories have been served shall serve a copy of the answers within thirty (30) days after service of the interrogatories. A shorter or longer period of time for answering or objecting to an interrogatory may be allowed for good cause shown. If the party issuing interrogatories does not comply with the provisions and limitations of this Rule, then the responding party need not respond to any part or subpart of the proffered interrogatories. Issues regarding interrogatories not resolved between the parties may be dealt with by Motion to the Office of Judges.

(d) The Office of Judges may issue an Order to Compel completion of interrogatories upon a showing of unjustified failure to cooperate. If a party fails to comply with an Order to Compel, the Office of Judges will issue an Order to Show Cause. Absent sufficient response, the Office of Judges may, in its discretion, impose any of the following sanctions:

(1) Decide the issue against the non-cooperating party;

(2) Issue an order dismissing the protest of the non-cooperating party;

(3) Take other actions as justified.

3. Medical Authorization.

Pursuant to W.Va. Code §23-4-7(b) the claimant agrees by filing an application for benefits that any physician may release certain medical information to the claimant's employer or its representative, and to a representative of the commission, successor to the commission, and other private carrier involved in the claim. Notwithstanding this statutory language, many hospitals and other medical providers require a signed medical authorization prior to releasing medical information to anyone other than the claimant. The claimant has a duty to sign a medical authorization that is in

compliance with all applicable statutes and applicable case law in order to provide the employer with relevant medical records.

The Office of Judges may issue an Order to Compel the signing of the authorization upon a showing of unjustified failure to cooperate. If a party fails to comply with an Order to Compel, the Office of Judges will issue an Order to Show Cause. Absent sufficient response, the Office of Judges may, in its discretion, impose any of the following sanctions:

(a) Decide the issue against the non-cooperating party;

(b) Issue an order dismissing the protest of the non-cooperating party;

(c) Take other actions as justified.

C. Rebuttal Evidence

The Office of Judges recognizes that the parties may, at times, need to offer rebuttal evidence. Rebuttal evidence may, and should, be filed during any Time Frame or extension. In cases where evidence is filed at or near the end of the existing Time Frame, an extension may be granted in accordance with the rules controlling the extension of Time Frames. Rebuttal may take the form of, but not be limited to, cross-examination of witness, examination of the claimant, or filing of expert reports; provided, that additional examination of the claimant may not exceed the limit on the number of examinations that may be obtained under the provisions of subsection 7.4 [93-1-7.4] of this Rule.

7.3 Documentary Evidence

A. Filings During Litigation

All filings during litigation shall be served on counsel of the other parties (or the party if not represented by counsel) and on the Office of Judges by mail or as may be permitted as in Rule 5 of the West Virginia Rules of Civil Procedure. Filing by facsimile is permitted together with other electronic means as may be approved by the Chief Administrative Law Judge.

B. Exchange of Evidence

1. Documents

The report of an expert or any other documentary evidence shall be offered in evidence by delivering the original, or an accurate copy, of such report or document to the Office of Judges with copies to all counsel of the other parties (or to the party if not represented by counsel) as soon as can

reasonably be accomplished following receipt of such report or document. For purposes of these rules, the term "original" shall also include certified copies or those documents produced under seal. The parties are encouraged to use the Office of Judges' "Document Submission Form".

2. Physical Evidence

Items not susceptible to reproduction or copying shall be brought to the attention of all other parties or their counsel and reasonable opportunity for inspection of such items shall be permitted within a reasonable time. Any evidence that cannot be scanned into the Electronic Document Management System must be accompanied by a written description of the evidence, the party submitting it, the date submitted, and the protest to which it applies. The parties are encouraged to use the Office of Judges' "Description of Physical Evidence Form".

3. W.Va. Bar I.D.

Members of the West Virginia Bar must provide his or her Bar membership number with any correspondence, filings, motions, objections, or other documents.

4. Failure to Comply with Exchange of Evidence

If a party fails to comply with the exchange of evidence requirements of these Rules, the Chief Administrative Law Judge or his/her designee may take one or more of the following actions:

(a) Order the party to supply the material required by this section;

(b) Grant a continuance to the party who was not served with a copy;

(c) Prohibit a party from introducing the evidence if there is a finding that the failure to disclose was intentional or without good cause;

(d) Consider the protest(s) submitted for decision upon the existing record excluding the evidence not served;

(e) Take such other action as may be necessary or proper for the proper conduct of a system of administrative review.

C. Alternatives to Testimony at Hearing and Other Evidence

1. Alternatives to Testimony at Hearing

The following alternatives to testimony at hearing may be received and considered, subject to objection and the right of cross-examination where appropriate:

(a) Sworn statements or affidavits;

(b) Prior testimony under oath;

(c) Stipulations of fact or expected testimony;

(d) Depositions and;

(e) Interrogatories and responses thereto.

2. Alternatives to Other Evidence

The following alternatives may be received and considered in lieu of evidence which is unavailable:

(a) Testimony describing the evidence;

(b) An authenticated copy, photograph or reproduction of the unavailable evidence;

(c) A stipulation of fact or expected testimony concerning such unavailable evidence.

D. Stipulations

1. General

A written stipulation, or an oral stipulation on the record, may be accepted as a substitute for evidence. A stipulation may relate to a question of fact, the contents of a document, or the expected testimony of a witness.

2. Requirements

Before accepting a stipulation, the Chief Administrative Law Judge or his/her designee must be satisfied that:

(a) The stipulation is relevant to an issue in litigation;

(b) The stipulation is written or stated in clear and unambiguous terms;

(c) A factual basis exists for the stipulation, which shall be thoroughly set forth upon the record or in the preamble section of a written stipulation; and

(d) All parties to the stipulation shall indicate in writing, or orally on the record, that they understand and agree to the stipulation.

3. Effect of stipulation

A stipulation of fact that has been accepted is binding upon the parties to the stipulation and may not be contradicted by those parties. The contents of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. A stipulation is not binding on the Office of Judges.

7.4 Examinations and evaluations

A. Right to Examination and Evaluation During Protest

In any litigation pending before the Office of Judges, all parties are entitled to a reasonable number of relevant medical examinations or vocational evaluations. For purposes of this section, a consultation or file review report constitutes an examination. The examination upon which the protested order is based does not count against the employer's or the claimant's limits.

A reasonable number of examinations or evaluations shall be no more than two (2) per specialty or discipline involved per protest; provided, that upon written request a party may be granted the right to further examinations or evaluations upon a showing of necessity. Such request shall set forth the reasons why such additional examination or evaluation is necessary. All other parties shall have fifteen (15) days after the date of service of said request to file a written response. Except upon motion of the Office of Judges, no hearing shall be held upon such request, and an Administrative Law Judge's Order thereon shall be interlocutory. When two or more protests have been consolidated by the Office of Judges, the examination limits shall not be cumulative. It is not the purpose of this rule to permit parties to submit more than two (2) examinations or evaluations per specialty or discipline involved when more than one protest has been consolidated by Order of the Office of Judges.

The limitations above do not overrule or replace any restrictions set forth in W.Va. Code §23-4-6(n), or elsewhere in the Code.

The Office of Judges may issue an Order to Compel attendance at an examination upon a showing of unjustified failure to cooperate. If a party fails to comply with an Order to Compel, the Office of Judges will issue an Order to Show Cause. Absent sufficient response, the Office of Judges may, in its discretion, impose any of the following sanctions:

1. Decide the issue against the non-cooperating party;

2. Issue an order dismissing the protest of the non-cooperating party;

3. Take other actions as justified.

B. Prompt Exchange of Reports

Reports of examination and evaluation shall be promptly exchanged among the parties or their counsel, upon request. Either party may submit such report to the Office of Judges without a hearing. When a report is offered to be made a part of the record by a party, it will be considered subject to the limitations set forth in subsection 7.4(A) [93-1-7.4(A)] of this rule.

C. Requests for Cross-examination

A request to cross-examine the author of a report shall be made promptly in writing to the party offering the report.

D. Production of Expert Witness for Cross-examination

When cross-examination of a reporting expert is properly requested, it shall be the responsibility of the party offering the report to procure the appearance of the witness for cross-examination. The expense of the expert witness shall be the responsibility of the party desiring to cross examine as provided in subsection 8.4(F) [93-1-8.4(F)]. The failure of the witness to appear may be grounds for excluding the report offered or other sanctions deemed appropriate.

If the non-appearing witness prepared a report at the request of the Workers' Compensation Commission, then the Office of Judges may issue an order compelling the Commission, until terminated, to make the witness available. If the Commission is unable to or otherwise fails to make the witness available, the Office of Judges may order the report expunged from the claim record and the Commission to procure another expert to replace the non-cooperative witness.

7.5 Identification of Relevant Documents from Claim Files

A. Introduction

W.Va. Code §23-5-9(c) provides that, subject to this Rule, the record upon which the matter shall be decided consists of evidence submitted by the parties, evidence taken at hearings, and "any documents in the claim files which relate to the subject matter of the objection".

With the transfer of claims management authority to self-insured employers, successors to the Workers' Compensation Commission, and private carriers, documents in claim files are no longer in the exclusive custody of the Workers' Compensation Commission. The Office of Judges does not have access to documents in the possession of the self-insured employer. Upon termination of the Workers' Compensation Commission, the Office of Judges may not have access to the documents in the possession of the successor to the Commission.

Although the Office of Judges may retain access to claim file documents and records in "Old Fund" claims, it is inefficient and confusing to have separate rules for "Old Fund", "New Fund", and self-insured cases. Consequently, this section has been amended to treat all cases as if the Office of Judges does not have access to claim file documents and records.

Consequently, identifying and filing relevant documents from those claim files inaccessible to the Office of Judges becomes the responsibility of the parties.

B. Relevant Documents

Subject to the limitations set forth in this Rule, the following documents from the claim files shall be considered relevant to the protest and shall be a part of the record in every protest:

1. The order which has been protested; and

2. Any document, report, or request for benefit specifically referred to in the order; and

3. The findings of the Occupational Pneumoconiosis Board; and

4. Any document or report specifically referred to in the findings of the Occupational Pneumoconiosis Board.

The Office of Judges may take judicial notice of any decision in the same

claim by an administrative law judge, the Appeal Board or Board of Review, or the Supreme Court. The Office of Judges may not have access to Supreme Court mandates, settlement agreements, other resolutions of an issue, or claims management decisions and histories, and the parties are responsible for filing with the Office of Judges any such relevant documents.

C. Compelling Production of Relevant Documents

The Office of Judges shall compel the employer (through its claims administrator) to produce those relevant documents identified in paragraphs one through four of the subsection 7.5(B) [93-1-7.5(B)(1-4)]. Failure to produce the compelled documents will be considered as evidence of interference with due process in the final resolution of the matter. Incidents of failure to comply, and evidence of deliberate withholding of documents subject to an Order to Compel, shall be reported to the Insurance Commission for possible administrative sanctions.

If the employer, through its claims administrator, fails to produce the relevant documents, then the Office of Judges may, in its discretion, impose any of the following sanctions:

(1) Decide the issue against the non-cooperating party;

(2) Issue an order dismissing the protest of the non-cooperating party;

(3) Take other actions as justified.

D. Designations Prior to Effective Date of Rule

For protests in litigation before the effective date of this amendment to the Rule, any documents already designated under the former version of this Rule will remain a part of the record.

E, Responsibility of the Parties for the Record

The parties are strongly admonished that the Office of Judges' lack of access to claims administration decisions and claim history makes it imperative for the parties to copy and submit all relevant orders and documents. The Office of Judges will no longer have access to the claim history and failure on the part of the parties to supply relevant documents may result in decisions made upon an inadequate record.

At the same time, however, the parties are encouraged to exercise caution to avoid creating a record that is overburdened with irrelevant documents. The parties do not assist the adjudicator's task of addressing relevant documents by

merely copying and submitting every document in their possession. The Office of Judges may reject irrelevant documents and may require an explanation of the relevancy of any document.

7.6 Documents Filed in Prior Protests

The parties may identify, as part of the record to be considered in a protest, any relevant documents which have been previously submitted or designated to the Office of Judges in other protests involving the same parties.

This identifying of relevant documents may be done by notice or motion during the Time Frame and does not require the actual copying and filing of a duplicate of the document previously submitted to the Office of Judges.

§93-1-8 ADMINISTRATIVE HEARING PROCEDURES; GENERALLY

8.1 Right to Administrative Hearing

Except for the expedited issues identified in W.Va. Code §23-4-1c(a)(3) and section 9 [93-1-9 et seq.] of this rule, any party to a protest shall, upon timely request, have a right to a hearing concerning any issue of fact or law upon which the claims administrator has made a decision within the meaning of W.Va. Code §23-5-1(b), and upon the timely filing of a protest.

A hearing, if not automatically scheduled by the Office of Judges pursuant to this Rule, shall be specifically requested by a party at least thirty (30) days prior to the expiration of the requesting party's Time Frame. If requested less than thirty (30) days before the expiration of the Time Frame, the party requesting the hearing shall state good cause for the untimeliness of the request. It is not the intent of this subsection to prohibit cross-examination or rebuttal evidence.

8.2 Date, Time, and Place of Administrative Hearings

Upon a timely request for a hearing, the Office of Judges shall determine the date, time and place such hearing will be conducted. A hearing may be continued by the Office of Judges only for administrative necessity or good cause shown pursuant to subsection 8.7 [93-1-8.7] of this rule.

Hearings may be conducted at such places as determined by the Office of Judges, giving due regard to the convenience of the witnesses. The Chief Administrative Law Judge, or his/her designee, may, at his/her discretion, conduct any hearing by telephone conference call.

The parties and their counsel of record shall be notified of the date, time, and place of a hearing at least ten (10) days in advance of the hearing date. For good cause or upon waiver of notice by the parties, less than ten days may be adequate notice.

8.3 Administrative Hearing Procedure

A. Testimony

All testimony shall be taken under oath or affirmation.

B. Cross-examination

All parties shall be given reasonable latitude in cross-examining witnesses. Cross-examination must take place in any time period set forth in a Time Frame Order.

C. Marking of Exhibits

All exhibits offered into evidence shall be marked as either "Claimant's Exhibits," "Employer's Exhibits," "Commission's Exhibits," or "Joint Exhibits" and the Office of Judges shall have a number assigned in sequence starting with "1" together with the claim number, the claimant's last name, the date of the hearing and identification of the issue. All exhibits offered into evidence, or copies thereof, shall be appended to the record of proceedings, where appropriate, and if any exhibit is not susceptible to attachment or copying, either a photograph, facsimile, or description of such exhibit may be substituted.

D. Objections

An Administrative Law Judge or Hearing Examiner shall rule upon all objections to the evidence or testimony presented at the hearing or offered by deposition, taking into consideration the apparent reliability of evidence, and the basis of knowledge of a witness. All objections shall be noted in the transcript of the hearing or deposition. Exceptions to a ruling on such objections shall be automatic. Oral argument and citation of authority by the parties in support of, or opposition to, objections may be required. In the event of adverse rulings the record may be preserved for appeal by written proffer or, at the discretion of the Administrative Law Judge or Hearing Examiner, by an oral vouching of the record.

E. Transcription of Hearing

All testimony, argument and rulings shall be recorded by stenographic or voice recording or by other means and shall be transcribed.

F. Conduct of Hearings

Pursuant to W.Va. Code §23-1-4(b), it is the policy of the Office of Judges that hearings will not be open to the general public. Only witnesses, family of the claimant, and agents or representatives of the employer or Commission, until terminated, may be present at the hearing. The Office of Judges may further restrict a hearing in the following manner:

1. If a person's conduct becomes unruly or disruptive, they may be removed from the hearing.

2. Witnesses may be removed from hearing upon the granting of a motion of a party that the witnesses be sequestered.

3. Camera/Audio coverage. Audio or video recording of any proceeding by anyone other than Office of Judges personnel is prohibited.

8.4 Witnesses; Subpoenas and Fees

A. Subpoena

Generally, a witness may appear at a hearing with, or without, a subpoena. The service of a subpoena is the responsibility of the party who desires the presence of the witness. However, when a party desires to cross-examine an expert witness who has authored a report, then arranging for the presence of that expert witness is the responsibility of the party who has offered the report.

The presence of a witness or production of evidence may be obtained by the issuance of a subpoena or subpoena duces tecum through a party's counsel as a member of the Bar and an officer of the Court. The subpoena or subpoena duces tecum shall bear a facsimile of the signature of the Chief Administrative Law Judge but must bear the actual signature of counsel. Blank forms shall be developed for this purpose which may be reproduced by counsel as needed. A party not required to be represented by counsel may request, in writing, that the Office of Judges issue a subpoena. A subpoena for a physician or other medical provider shall also include a subpoena duces tecum for the treatment records and notes pertaining to the claimant. Service of any subpoena shall be the responsibility of the party who has requested the subpoena. The Office of Judges or a party may seek judicial enforcement of such subpoena.

It is not necessary for the Office of Judges to issue an Order to Compel when a subpoena has been properly served. At the request of the party who had the subpoena served, and upon allegation of service as defined in

subsection 8.4(B) [93-1-8.4(B)], the Office of Judges will issue an Order to Show Cause to a non-appearing party. Said Order to Show Cause will notify the non-appearing party of the possible sanctions for failure to explain his or her non-appearance.

B. Service

It shall be the responsibility of the party requesting the issuance of a subpoena to serve the subpoena on a witness by personal service, certified mail, or by regular mail, with a certificate of service executed by counsel. The subpoena shall be served at least seven (7) days before the hearing. A copy of the subpoena shall be provided counsel of the other parties (or the party if not represented by counsel) at the time of service.

C. Right to Examine or Cross-Examine Witnesses

Each party is entitled to compel the attendance at a hearing of any witness whose testimony may be relevant and material, except a party is not entitled to the presence of a witness who is deemed unavailable. A witness shall be deemed unavailable in, but not limited to, the following situations:

1. The witness is not subject to compulsory process in West Virginia by reason of non-residence within, or prolonged absence from, the State of West Virginia, unless that witness is the claimant or the employer.

2. The witness refuses for good cause to testify despite an Order to do so.

3. The witness claims by sworn affidavit a lack of memory of the subject matter.

4. The witness is unable to be present or to testify at the hearing because of then existing physical or mental illness or infirmity.

5. The witness is absent from the hearing and the requesting party is not at fault, could not have prevented the unavailability, and demonstrates that all reasonable measures to secure the presence of the witness have been taken, including the timely request for and service of a subpoena.

D. Failure of a Witness to Comply

Upon failure or refusal, without good cause, of a witness to comply with a properly served subpoena, the Chief Administrative Law Judge or his/her designee may employ proper sanctions including, but not limited to:

1. a decision reversing the protested order;

2. an order dismissing the protest;

3. submission of the protest for final determination upon the existing record; or

4. when personal service of a subpoena has been obtained, institution of attachment proceedings as for contempt in Circuit Court.

Prior to imposition of one or more of the aforementioned sanctions, a written notice may be issued allowing fifteen (15) days to show good cause to the Office of Judges why such sanctions should not be imposed.

E. Exclusion of Evidence

Upon the failure or refusal of a properly subpoenaed witness to appear, produce requested evidence or testify in response to a subpoena, the Chief Administrative Law Judge or his/her designee may exclude any statement, record or report rendered by that witness from the record to be considered.

F. Witness fees

1. General

Except for expert witnesses as provided for in the next subsection [93-1-8.4(F)(2)], the party requesting to cross-examine a witness shall pay the attendance fees and mileage as provided for witnesses in civil cases in circuit court. Such fees shall be paid in advance upon a timely request by the witness. When a witness appears at the request of the Workers' Compensation Commission, until terminated, or any other state agency, such advance payment shall not be required.

2. Expert Witness Fees

The party who requests to cross-examine an expert witness shall be responsible for payment of the appearance fee of such witness~~,~~. However, pursuant to 85 CSR 1, sections 17.1 and 17.2, the Workers' Compensation Commission, its successor, self-insured employer, or private carrier, shall be responsible for payment of a witness fee when the claim has not been rejected and the witness is:

(a) An authorized treating physician, or

(b) An authorized consulting physician acting upon referral from an authorized treating physician.

3. Expert Witness Fee Limitations

Following the termination of the Commission and its fee schedules, the amount of expert witness fees shall be as agreed by the parties based upon the usual and customary rate for the profession involved. The fee shall not exceed one hundred dollars ($100) per quarter-hour of actual testimony at hearings or depositions. Additional charges for actual time reviewing records prior to the testimony may not exceed two quarter-hours. The witness may require advance payment not to exceed the reasonably anticipated length of the testimony and records review; Provided, that a witness may not require advance payment from the Workers' Compensation Commission, or any other state agency.

8.5 Limited Purpose of Certain Hearings

A request for hearing may not be used to submit written or physical evidence after the expiration of a party's Time Frame. Evidence, which would have been untimely under the original Time Frame Order, may not be submitted at a hearing conducted during an extension of the Time Frame when said extension was granted solely for purposes of conducting a hearing. However, evidence first discovered at such hearing may be the basis for good cause for an untimely request for extension of the time frame**.** Furhermore, evidence that serves to rebut the testimony given at the hearing may also be introduced at the hearing.

8.6 Special Hearings

The Office of Judges may schedule a hearing on any issue in litigation to require closing argument by the parties. The purpose of this hearing may include, but not necessarily be limited to, a determination of the issues to be decided in the written decision, identification of the evidence relied upon by the parties, and a summation by each party as to why this evidence supports their position. A request by a party for such hearing may be granted upon a showing of good cause.

Failure to attend and/or participate in this hearing may result in the following:

A. dismissal of protest and affirmation of claims administrator's Orders;

B. exclusion of evidence from consideration;

C. denial of motion for reconsideration; and

D. such other sanction as the Chief Administrative Law Judge or his/her designee may deem appropriate.

8.7 Continuances

Postponement or rescheduling of hearings, known as "continuances", shall be granted only at the request of a party and only for good cause shown, except that the Office of Judges may, for appropriate administrative purposes, continue a hearing without a request by a party. After a date for a hearing has been set, any party who desires a continuance shall file a written motion with the Office of Judges, with copies to the other parties, stating in detail the reasons why such a continuance is necessary. If the motion is based on a conflict in schedule, such motion shall set forth in detail the specific nature of the conflict. Such written motion shall be filed no later that ten (10) days prior to the date of the scheduled hearing, unless by agreement of the parties or upon good cause shown, a shorter period is permitted, and shall be served on all parties at that time.

Continuances of hearings in the expedited adjudication process are governed by section 9.6 [93-1-9.6].

8.8 Absence of Parties at Hearings.

All parties to a claim are entitled to be present at a hearing; however, the absence of a party shall not prevent the taking of evidence and the final determination of the issues in litigation. A party shall be considered to have waived the right to be present if:

A. After being notified of the date, time and place of a hearing, a party does not appear, absent a showing of good cause; or

B. After being advised that disruptive conduct will cause removal from the hearing, a party persists in conduct which is such as to justify exclusion from the hearing.

§93-1-9 EXPEDITED ADJUDICATION PROCESS

9.1 Expedited Issues

In compliance with the provisions of W.Va. Code §23-4-1c(a)(3), for rulings denying the compensability of the claim, denying initial Temporary Total Disability, or denying medical authorization, the Office of Judges will make available to the claimant an expedited adjudication process.

9.2 Election of Expedited Process

The claimant must notify, in writing, the Office of Judges, and all parties, of intent to proceed with the expedited process. Notice of the election to proceed with the expedited process must be received no later than fifteen (15) days after the date the protest was acknowledged by the Office of Judges.

Once a claimant has elected to proceed with the expedited process, the matter cannot be removed from the expedited process except by agreement of the parties or for the most compelling of good cause.

9.3 Scheduling of Expedited Administrative Hearing

The Office of Judges will regularly schedule dockets for expedited issues at selected locations around the state and at regular intervals. Once notified of the election to proceed with the expedited process, the Office of Judges will schedule an administrative hearing to be conducted at the special dockets venue closest to the claimant's residence. The Office of Judges will attempt to conduct the hearing within a minimum of twenty-five (25) days, and a maximum of forty-five (45) days, from receipt of the election.

9.4 Expedited Administrative Hearing

Hearings in the expedited process will last no longer than thirty (30) minutes; divided at fifteen (15) minutes per side. If the parties anticipate requiring more lengthy testimony, then the parties should obtain that testimony at a deposition prior to the expedited hearing.

The parties are not required to appear at the expedited process hearing, unless subpoenaed, and may submit any arguments or evidence in writing prior to the hearing date.

9.5 Time Limit for Filing Evidence

Evidence from any party must be submitted to the Office of Judges before, or at, the administrative hearing. The existing Time Frame shall expire on the date of the hearing.

9.6 Continuances

Hearings shall not be continued except by agreement of the parties or upon the most compelling of good cause. Good cause determinations will be strictly resolved in view of the legislative mandate to expedite the resolution of the issue.

9.7 Expedited Decisions

The Office of Judges shall issue a decision within thirty (30) days of the date of the administrative hearing.

9.8 Exceptions

This expedited adjudication process shall not be available for occupational pneumoconiosis, hearing loss claims, or complex issues as identified at the discretion of the Office of Judges.

9.9 Failure to Prosecute in Expedited Adjudication

In protests in which no new evidence has been introduced, or no argument in lieu of evidence has been filed by the hearing date, the provisions of section 10 [93-1-10] shall apply.

§93-1-10 FAILURE TO PROSECUTE PROTEST

10.1 Introduction

The Workers' Compensation Office of Judges is provided with limited resources with which to resolve many thousands of protests filed each year. Frequently the protesting party fails to submit any evidence, offer any testimony, or provide any argument explaining the basis for the protest.

This section does not imply, or create, a presumption that the ruling of the claims administrator is correct. In fact, the Office of Judges recognizes that there may occur occasion when an Order is incorrect on its face. Such an occasion should not require the party to submit new evidence or testimony in order to prevail. However, the protesting party should offer explanation as to why the ruling is believed to be incorrect.

The Office of Judges might reasonably expect the protesting party to formally withdraw its protest when no longer interested in pursuing the protest, but the history of this office reveals that, in many cases, for many different reasons, the party will not always do so. An inefficient protest resolution process is created when the Office of Judges must guess why a party protested or if the party still intends to pursue the protest. If the protesting party does not submit evidence, testimony, or reason for the protest, then the resources required for

resolving a protest, which the party may no longer be interested in pursuing, would better be utilized in resolving actually disputed claims.

Accordingly, this section allows for an efficient resolution of such protests where the party does not proceed, does not explain the basis for the protest, and does not withdraw the protest.

10.2 Requirements

The party protesting an order of the claims administrator, has the burden of presenting evidence or argument in support of its position. Evidence or argument must be filed before the expiration of the protesting party's time frame. Unless the protesting party timely files evidence or argument, the order will be affirmed.

The requirement of this section may be met by the filing, or receipt, during the party's Time Frame, of any of the following:

A. documentary or physical evidence;

B. testimony at administrative hearing scheduled by the Office of Judges;

C. argument in lieu of evidence (must be submitted during Time Frame);

D. notice or motion identifying relevant documents from other protests involving same parties.

The requirement of this section shall not be met by a party merely supplying the Office of Judges with a copy of any information already submitted to the claims administrator, or with a copy of any order of the claims administrator. The intent of the requirement is to compel the protesting party to submit new information or, in the alternative, an explanation of the basis for the protest.

10.3. Order to Show Cause

The Office of Judges will review each matter at the conclusion of the protesting party's time frame to determine whether the protesting party has submitted evidence or argument in lieu of evidence. If it appears from a review of the matter that the protesting party has not filed any evidence or argument, the Office of Judges shall issue a Show Cause Order to the protesting party for the purpose of allowing the protesting party to demonstrate that some evidence or argument had been timely filed.

10.4 Decision Affirming Order

If the protesting party fails to show that evidence or argument has been timely filed, or if there is no response to the Show Cause Order, the Office of Judges shall issue a decision affirming the claims administrator's order. Such decision issued pursuant to this rule may be appealed to the Workers' Compensation Board of Review.

§93-1-11 OCCUPATIONAL PNEUMOCONIOSIS

11.1 Non-medical Order

The order of the claims administrator determining whether the claimant has met the requirements set out in W.Va. Code §23-4-15b shall hereinafter be referred to as non-medical order. Litigation regarding such order including any issue regarding the chargeability of an employer, must be conducted by the parties during the non-medical litigation. The issue of chargeability shall not be litigated before the Occupational Pneumoconiosis Board during litigation on permanent partial disability awards for occupational pneumoconiosis, although medical questions involving the issue of causation of the claimant's occupational pneumoconiosis may be referred to the Board.

11.2 Referrals to the Occupational Pneumoconiosis Board During Non-Medical Litigation

Referrals to the Occupational Pneumoconiosis Board during non-medical litigation shall be made at the discretion of the Chief Administrative Law Judge or his/her designee only when there is a reasonable doubt about any medical question regarding the issues determined in the non-medical Order. In making its opinion as to whether the claimant's employment with a particular employer could have caused claimant's breathing problems, the Occupational Pneumoconiosis Board shall review any other relevant medical records and such other information in the record as the Board deems relevant to the claimant's medical condition.

11.3 Hearings Before the Occupational Pneumoconiosis Board

A. Time Frames

The procedure regarding requests for extensions of time frames and continuances of hearings for claims involving permanent partial disability awards for occupational pneumoconiosis shall be the same as in all other claims.

B. Initial Hearing

Upon request of any party, the Office of Judges may set an initial hearing for the sole purpose of examining the Occupational Pneumoconiosis Board members about their findings based upon their examinations of the claimant upon which the award in litigation was based. Requests for such hearings must be made no more than ninety (90) days after the beginning of the protesting party's time frame. At such initial hearing the parties shall not ask the Board to evaluate evidence introduced in support of the respective positions unless it is agreed by all parties that the claim shall be submitted for final determination at the conclusion of that hearing. Initial hearings shall be set at the discretion of the Office of Judges with due regard to the scheduling of all occupational pneumoconiosis claims in litigation, particularly the amount of docket time available before the Occupational Pneumoconiosis Board. The setting of such hearings is discretionary and not a matter of right of any party.

C. Final Hearing

A final hearing shall be scheduled after the expiration of the time frame. However, a final hearing will be scheduled only when new evidence has been submitted to the Office of Judges or when a party has timely requested a final hearing to examine or cross-examine the members of the Occupational Pneumoconiosis Board.

D. Extensions at Hearing

Extension of time frames may be granted by the presiding Administrative Law Judge at hearings before the Occupational Pneumoconiosis Board for good cause or if the requesting party can show that they have made a request in a timely manner prior to the expiration of their time frame and that the Office of Judges has not yet acted upon this request.

E. Hearing When Responding Party Is Unrepresented

In any case in which a non-protesting party (hereinafter referred to as the responding party) is unrepresented, when new evidence has been introduced before the Office of Judges by the protesting party, or a request for hearing has been made, an Order may be issued at the end of the protesting party's time frame requiring the responding party and the Workers' Compensation Commission, until terminated, to show cause why the claim should not be set for hearing after which the claim shall be submitted for final determination. If no response is received or no good cause is shown by the responding party or the Workers' Compensation Commission, until terminated, within fifteen (15) days of the mailing of such Order, the claim shall be set for hearing before the Occupational Pneumoconiosis Board.

F. Failure to Prosecute

In protests in which no new evidence has been introduced before the Office of Judges by the protesting party, or a request for hearing has not been made, the provisions of section 10 [93-1-10 et seq.], "Failure To Prosecute Protest", shall apply.

G. Scheduling of Hearing

In protests in which evidence has been introduced by either a protesting or responding party, a hearing shall be scheduled before the Occupational Pneumoconiosis Board after the expiration of the responding party's time frame unless the parties agree that a hearing may be set earlier.

11.4 Review of Claim Files by the Occupational Pneumoconiosis Board Prior to the Final Hearing.

In protests set before the Occupational Pneumoconiosis Board pursuant to W.Va. Code §23-4-8c(d), it may be necessary for the Board to review the records of some claims prior to the hearing. This may be due to the complexity of medical issues, the volume of medical evidence, or other appropriate reasons. Claims may be subject to such review as follows:

A. Upon the request of the Board or the majority of its members who examined the claimant in the protest in question;

B. Upon the ruling of the Administrative Law Judge presiding over the hearing of the protest in question;

C. Upon the motion of any party in the protest in question, such motion being subject to the following conditions:

(1). The moving party must state with specificity why such review is necessary, including but not limited to a list of evidence relied upon by both parties; and

(2). The moving party must certify that the introduction of all evidence by all parties is complete, that the evidence has been served upon all the parties and that the parties will submit the protest for final determination at the conclusion of the hearing for which prior Board review is requested. The Office of Judges will give consideration to circumstances arising at the hearings which could not have been reasonably foreseen by the parties, and if in the judgment of the presiding Administrative Law Judge, an additional hearing is necessary, the protest shall be set for one additional hearing.

(3). Failure to satisfy the conditions of subsections 11.4(C)(1) and (2) [93-1-11.4(C)(1) and 93-1-11.4(C)(2)] of this rule shall result in the denial of the request for the Board to review the record prior to the hearing.

(4). If a motion for such review prior to a hearing is granted by the Office of Judges, the Office of Judges may, in its discretion, order the parties to identify the record to be reviewed by the Board

(5). Any ruling by the Office of Judges regarding the granting or denying of a request for Board review of a claim prior to a hearing shall be considered interlocutory and may be appealed only in conjunction with a decision entered in the instant protest.

§93-1-12 MOTIONS, OBJECTIONS, and CORRESPONDENCE

12.1 General

A copy of all correspondence, motions, objections or other documents provided to the Office of Judges regarding any issue in litigation shall be provided to all counsel of the other parties (or to the party if not represented by counsel). Some indication that copies were provided to all other parties must accompany the documents provided to the Office of Judges.

Members of the West Virginia Bar must provide his or her Bar membership number with any correspondence, filings, motions, objections, or other documents.

12.2 Motions or Objections In Writing

Any motion or objection may be made in writing. The motion shall clearly set forth all grounds, facts, and authorities in support of the motion. Any response by an opposing party shall be filed in writing with the Office of Judges within fifteen (15) days of receipt of the motion, and shall set forth all matters in opposition to the motion.

12.3 Motions or Objections During Hearing

A motion or objection may be made on the record, orally or in writing. The motion shall clearly set forth all grounds, facts and authorities in support of the motion. The opposing party, if present, shall have the right to set forth matters in

opposition to such motion on the record. The absence of a party shall not be grounds for delay in ruling upon any motion, or grounds for reconsideration of any ruling made, absent a written motion for reconsideration and an affirmative showing of good cause for such nonappearance by the opposing party.

12.4 Rulings Interlocutory in Nature

All rulings upon motions shall be interlocutory in nature and may not be appealed except in conjunction with a final decision unless specifically noted otherwise in the ruling on the motion.

§93-1-13 DEPOSITIONS

13.1 General

In order to promptly and efficiently process cases the parties are encouraged, particularly for the purpose of cross-examining expert witnesses, to use depositions to the maximum extent possible. Accordingly, depositions may be obtained and used for evidentiary purposes without prior consent of the Office of Judges. Depositions shall be conducted in accordance with section 8 [93-1-8 et seq.] of this rule, except that an Administrative Law Judge or Hearing Examiner need not be present and any person otherwise qualified and authorized to administer oaths or affirmations may do so to the deponents. Objections to questions asked in a deposition will be noted upon the record along with the grounds for the objection, and the question shall be answered with the question and answer transcribed as a part of the deposition on avowal. Motions relative to any objections made shall be submitted in writing to the Office of Judges within fifteen (15) days after either party tender the deposition to be made a part of the record. A ruling on motions as to the admissibility or inadmissibility of any questions and answers objected to will be rendered in a timely manner.

13.2 Procedure

The taking of a deposition shall be by agreement of the parties or upon reasonable notice to the deponent and all parties or, if the party is represented by counsel, their counsel of record. Notice shall be in writing and shall contain the date, time and place of the deposition as well as the name and address of each person to be deposed. The cost of court reporter services shall be borne by the Workers' Compensation Commission, until termination. After termination of the Workers' Compensation Commission, the party requesting the deposition shall bear the cost of the court reporter. The cost of witness fees and expenses shall be borne by the party requesting the appearance of the witness, as provided in subsection 8.4(F) [93-1-8.4(F)] of this rule. Parties are encouraged to utilize depositions to obtain testimony whenever possible.

13.3 Telephone Depositions

Depositions may be taken by telephone conference call as if taken in person. The procedure shall be the same as set forth in subsection 13.2 [93-1-13.2]. Costs incurred in the taking of telephone depositions shall be borne as provided in subsection 13.2 [93-1-13.2].

13.4 Use

Use of any deposition shall be subject to objection as in Circuit Court. The admission of any deposition into evidence may be denied if it appears that the deposition was taken at such place and under such circumstances as to impose an undue burden or hardship upon the opposing party.

§93-1-14 DISMISSALS of CLAIMS and PROTESTS

14.1 Dismissal, or Withdrawals, of Protests

Upon motion of any party, upon request of the protesting party, or as a sanction permitted the Office of Judges by these rules, any protest pending before the Office of Judges can be dismissed from litigation.

14.2 Dismissal of Claims

The Office of Judges does not have statutory authority to dismiss a claim. The office of Judges' jurisdiction is limited solely to pending protests. Any motion, or request, to dismiss a claim must be directed to the claims administrator.

§93-1-15 ADDING or DISMISSING CHARGEABLE EMPLOYERS

When it appears that another employer may have liability for some, or all, of the claim, the Office of Judges shall notify the potentially chargeable employer, and its carrier, of the right to participate in the ongoing litigation.

No employer may be added by final decision, and no employer may be dismissed by final decision, until after all other potentially chargeable employers have been given notice and the opportunity to appear. The final decision may take the form of a remand to the proper claims administrator, or the Insurance Commission, for additional investigation and entry of a new allocation order.

§93-1-16 DECISIONS; OTHER RESOLUTIONS; and MOTIONS to RECONSIDER

16.1 Decisions

Pursuant to W.Va. Code §23-5-9(d), the Office of Judges shall issue a written decision containing findings of fact and conclusions of law for all protests submitted for decision. This decision, a copy of which will be mailed to all the parties and their counsel of record, shall be subject to appeal to the Worker's Compensation Board of Review pursuant to W.Va. Code §23-5-10.

16.2 Other Resolutions of Protests

The Office of Judges may resolve a protested issue by ruling or order where the protesting party fails to comply with a properly served subpoena, withdraws its protest, fails to prosecute its protest, or for any other reason the Chief Administrative Law Judge deems appropriate.

16.3. Motions to Reconsider

Any party may file a motion to reconsider any final resolution of a protest. Such relief should not be sought, and will not be granted, where the sole basis for the motion is disagreement with the reasoning of the decision. Motions to reconsider shall be granted only when clerical or administrative error has occurred in the decision.

Examples of the type of error correctable by this relief include, but are not limited to:

A. Mathematical or typographical errors;

B. Failure to discuss or mention relevant evidence or argument timely submitted;

C. Failure to rule upon a pending motion or other information indicating that the issue was prematurely decided.

Such motion must be filed within thirty (30) days of the date of receipt of the decision. The filing of a motion for reconsideration shall not toll the running of the jurisdictional time limits for filing an appeal with the Workers' Compensation Board of Review.

§93-1-17 MEDIATION

17.1 General

The Office of Judges, upon its own motion or upon request of any party, may refer a claim, or any issue therein, to mediation.

Assignment of a protest or case to mediation does not toll or delay the adjudication process. At the conclusion of the litigation process a decision will be issued based on the evidence of record with no consideration given to the mediated negotiations.

17.2 Mediator

Unless selected by agreement of the parties, the Office of Judges shall assign a mediator to conduct the mediation. The Office of Judges shall maintain a list of interested and qualified mediators as identified by the State Bar. The Office of Judges will select a mediator who is willing to serve without compensation. The parties may agree to their own choice of mediators and will be responsible for compensation of that mediator.

17.3 Conduct

The mediator will schedule and conduct any meetings with the parties and will report to the Office of Judges the results of the mediation process within a time period set by the Office of Judges.

The proceedings of any meetings, including any statements made by any party, attorney, or other participant, shall, in all respects, be confidential and not reported, recorded, placed in evidence, or otherwise made known to the adjudicator assigned the case for decision. A mediator shall maintain and preserve the confidentiality of all mediation proceedings. No party shall be bound by anything done or said at the mediation meeting unless a settlement is reached, in which event the agreement shall be reduced to writing and shall be binding upon all parties to that agreement.

17.4 Outcome

If a settlement is reached, the mediator may direct counsel to prepare the agreement and circulate it for signature by all parties to the claim. Upon obtaining an executed settlement agreement the mediator shall notify the Office of Judges that the matter has been resolved and shall supply the Office of Judges with a copy of the settlement agreement. Once the settlement agreement has been received by the Office of Judges, the protests, if any, will be dismissed in conformity with the settlement agreement.

If the parties are unable to resolve their dispute at the mediation meeting, the mediator shall make note that there has been compliance with the requirements of this rule, but no settlement has been reached.

17.5 Sanctions for Failure to Participate.

Any party to a claim selected for mediation must have full authority to settle without additional consultation. Nothing in this rule shall be interpreted as to compel a party to agree against his or her interest to any settlement.

Failure to participate in the mediation process may be grounds for sanctions for non-compliance including, but not limited to:

A. a decision reversing the protested order;

B. an order dismissing the protest;

C. submission of the protest for final determination upon the existing record; or

D. such other sanctions as may be justified in the discretion of the Office of Judges.

§93-1-18 EXPEDITED PROCESS for FAILURE of ADMINISTRATOR to TIMELY RULE on APPLICATION, PETITION, or MOTION

18.1 Initiation of Process

In order to initiate this process, the claimant must submit in writing to the Office of Judges a statement setting forth the following information:

A. The claimant's name, address, phone number, social security number, date of injury (or last exposure), employer's name and address, and insurer's name;

B. The policy number, claim number, and case number, if known;

C. The nature of the action requested of the insurer;

D. The date the action was request was submitted to the insurer;

E. The address to which the request was mailed or delivered.

The Office of Judges will provide a form for the submission of the required information.

18.2 Notice to Employer

Upon receipt of a properly completed statement, or form, the Office of Judges will immediately transmit a copy of the statement, or form, to the employer. The notice shall order the employer to make a ruling, or take required action, within the time limits provided by the applicable statute or regulation.

The notice shall also set a deadline for submission of any statements or evidence that either employer or claimant wishes to submit for consideration by the Office of Judges.

18.3 Findings of Office of Judges

Following the deadline for submission of statements or evidence, the Office of Judges will review the matter and report findings of fact and conclusions of law to the Insurance Commission. The Insurance Commission may take such administrative action as it determines to be justified.

§93-1-19 UNREASONABLE DENIALS and ATTORNEY FEES

19.1 Scope

Pursuant to W.Va. Code §23-2C-21(c), if the denial of compensability, initial award of TTD, or medical authorization is determined by the Office of Judges to be unreasonable, then reasonable attorney fees and expenses will be paid to the claimant by the successor to the Commission, private carrier, or self-insured employer, which issued the unreasonable denial.

For purposes of this section, “denial of initial award of TTD” shall mean the instance where the claim is ruled compensable on a “medical only” or “no-lost-time” basis and the private carrier or self-insured employer unreasonably fails to make an initial award of temporary total disability benefits. The denial of an “initial award of TTD” does not mean the denial of any extension or reopening of TTD.

19.2 Initiation of Process

At the conclusion of all litigation and appeals, if the initial denial of the claim, initial award of TTD, or medical authorization, has been reversed, the claimant may then submit to the Office of Judges an allegation that the denial was unreasonable under the definition provided by 23-2C-21(c).

The process is initiated upon receipt by the Office of Judges of the claimant’s allegation, in writing, with a copy to the employer. Notice of the allegation must be filed with the Office of Judges within ninety (90) days of the final decision of final appeal outcome.

19.3 Filing of Evidence and Argument

The Office of Judges will issue a Time Frame Order setting forth the time limits for the filing of evidence and argument by either party in support of, or opposition to, the allegation.

In as much as the statute requires a determination of the unreasonableness of the carrier's action at the time of the denial, evidence introduced by the claimant after the denial, in support of the protest to the denial, is not relevant and will not be considered on the issue of unreasonableness.

19.4 Unreasonable Denial Defined

A denial shall be unreasonable if the denial by the private carrier or self-insured employer is without a legal or factual basis. The legal basis for a denial may be based upon any of the following:

A. Statutes;

B. Rules of the Workers' Compensation Commission or rules of the Insurance Commissioner, including existing rules of the Workers' Compensation Commission that have been adopted and made effective as to the operation of the workers' compensation insurance market in accordance with the provisions of W. Va. Code §23-2C-22;

C. Case law; or

D. In the absence of relevant West Virginia case law, recognized legal treatises on workers' compensation.

The mere fact that an initial denial decision is eventually reversed or overturned upon appeal does not prove or imply that the denial decision was unreasonable.

19.5 Decision

Following the expiration of the Time Frame, the Office of Judges will issue a decision determining whether the denial meets the statutory definition of "unreasonable". The decision shall be subject to appeal to the Workers' Compensation Board of Review. If the Office of Judges concludes that the denial was unreasonable, then the successor to the Commission, private carrier, or self-insured employer will be ordered to pay reasonable attorney fees and costs.

19.6 Fees and Expenses

The claimant shall submit a petition to the successor to the Commission, private carrier, or self-insured employer, who will determine the reasonableness of the attorney fees and costs according to applicable rule. Disputes over the amount approved may be protested to the Office of Judges as provided for by article five of chapter twenty-three.

§93-1-20 SEVERABILITY

If any provision of these rules or the application thereof to any person or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.